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In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondents' opposition treats the Council's retail rate-making rights and the Council's obligation under the filed rate doctrine as though those were the same thing: Matters over which the Council has authority.[1] This "blending" of the Council's rights and obligations is a fallacy common to each of respondents' arguments. By separating the Council's rights from its duty under the

[1] In setting retail rates, the Council has the right to determine the appropriate cost of capital, the rate base, the revenue requirement and how it should be spread among the residential, commercial and industrial customer classes, even the timing of a phase-in, so long as the utility fully recovers its revenues together with the cost of financing the deferral of collection of those revenues. When setting retail rates, however, the Council does not have the right to disregard FERC-imposed costs; it has the *obligation* to give effect to such costs. *Nantahala Power & Light Co. v. Thornburg*, _____ U.S. _____, 106 S.Ct. 2349, 2357 (1986).

filed rate doctrine, the issues in this case can be properly analyzed.

1. *Respondents' Mootness Argument.*

The respondents are correct that the traditional retail rate-making issues were resolved by the partial settlement. The respondents are incorrect, however, in their assertion that resolution of those issues, which merely address the Council's traditional authority to regulate retail rates, renders PUBLIC SERVICE's case moot. The gravamen of PUBLIC SERVICE's complaint -- that the Council exceeds its authority when it refuses to recognize fully PUBLIC SERVICE's FERC-mandated costs for purposes of calculating retail rates -- has not been resolved.[2]

The "heavy" burden of demonstrating mootness[3] rests upon the party who alleges it. *County of Los Angeles v. Davis,* 440 U.S. 625, 632 (1979). In *Davis*, this Court established a two-prong test to determine whether intervening events render a pending case moot, stating that

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[2] PUBLIC SERVICE did not seek to enjoin the Council's resolution of those retail rate-making issues over which the Council properly has authority. Those issues have now been resolved as a result of a partial settlement between the Council and PUBLIC SERVICE (see Pet. at 6, n. 7). That partial settlement did not, however, resolve the issue raised by PUBLIC SERVICE's complaint: Whether, for purposes of calculating PUBLIC SERVICE's retail rates, the Council may choose an allocation of cost and power from Grand Gulf Unit 1 that differs from the allocation mandated by the FERC.

[3] The district court, which was made aware of the partial settlement, did not vacate its order and dismiss the matter as moot; neither did the Fifth Circuit when it was made aware of the partial settlement. The Council obviously does not consider this matter to be moot; it did not terminate its docket No. CD-85-1 following the partial settlement. It is continuing to hold hearings and proceedings to address how much of PUBLIC SERVICE's FERC-imposed costs should be excluded from the retail rate recovery.

a case is rendered moot if:

> 1.) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur [citations omitted], and
>
> 2.) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation [citations omitted].

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). *See also Jacksonville Bulk Terminal, Inc. v. International Longshoreman's Association*, 457 U.S. 702 (1982), and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982).

The respondents must prove that both conditions are satisfied to prevail on their mootness argument, yet neither condition is satisfied in this case. Where, as here, the Council is proceeding to determine whether $150 million *or more*[4] of PUBLIC SERVICE's FERC-mandated costs will be excluded in calculating PUBLIC SERVICE's retail rates, it cannot "be said with assurance that there is no reasonable expectation that the alleged violation [of the filed rate doctrine] will recur." *County of Los Angeles v. Davis*, 440 U.S. at 631. The Council is proceeding to determine how much of PUBLIC SERVICE's FERC-imposed costs are to be excluded by the Council for purposes of

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[4] "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496-498 (1969)." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984). The Council is presently engaged in hearings to determine how much of PUBLIC SERVICE's allocation of costs and power from Grand Gulf Unit 1 will be excluded by the Council for purposes of calculating the rates to be charged PUBLIC SERVICE's retail customers. The Council's various consultants have proposed excluding from retail rates *as little as* $150 million and as much as 65% of PUBLIC SERVICE's FERC-imposed costs.

calculating PUBLIC SERVICE's retail rates, not because of a determination or finding that costs *other than* those resulting from the purchases of FERC-regulated power were to decrease, *Nantahala*, 106 S.Ct. at 2357, but because the Council is not satisfied with the allocation established by the FERC and chooses instead to calculate PUBLIC SERVICE's rates as though PUBLIC SERVICE had been allocated less of the "more expensive purchased power than under FERC's order." *Nantahala*, 106 S.Ct. at 2359.

Further, the interim event to which the Council points (the partial settlement) does not completely or irrevocably eradicate the effects of which PUBLIC SERVICE complains because the Council, in the partial settlement, specifically reserved its "right" to reduce the portion of PUBLIC SERVICE's FERC-mandated costs used in calculating PUBLIC SERVICE's retail rates. Simply vacating the Fifth Circuit's amending opinion would not suffice; indeed, it would perpetuate the error.[5]

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[5] First, it would not bring the controversy to a close, *Stotts*, 467 U.S. at 586 (O'Connor, J., concurring); further, unless that expression of the Fifth Circuit is reversed, it will have precedential weight that will cause other district courts to reach the wrong result.

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, *O'Connor v. Donaldson*, 422 U.S. 563, 577-578, n.12 (1975); *A. L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329-330 (1961); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . Circuit.

Davis, 440 U.S. at 446 (Powell, J., dissenting).

2. *The Abstention Argument.*

Citing *Burford*[6] for the principle that federal courts should not disrupt a *state* regulatory scheme, respondents treat their rights and their obligations as part of the same *state* regulatory scheme, and conveniently ignore the fact that PUBLIC SERVICE's complaint involves a subject upon which a state regulatory scheme may not entrench. To paraphase this Court's most recent opinion addressing the extent and breadth of the filed rate doctrine:

> There is only [the Council's] assertion that [PUBLIC SERVICE] should have obtained [less] of the FERC-regulated power than [PUBLIC SERVICE] is [responsible for] under FERC's order. Such a rationale runs directly counter to [FERC Opinion No. 234], and therefore *cannot withstand the preemptive force of FERC's decision.*

Nantahala, _____ U.S. _____, 106 S.Ct. at 2358 (emphasis added).

With respect to *Younger*[7] abstention, respondents again rely on "blending" the Council's rights with the Council's obligation to include, when calculating the retail rates that PUBLIC SERVICE may recover, PUBLIC SERVICE's FERC-mandated costs. Respondents' "important state interests" in such matters as rate design and phase-in were not challenged by PUBLIC SERVICE and have been resolved as a result of the partial settlement. What was challenged by PUBLIC SERVICE's complaint that has yet to be resolved does not pertain to an "important state interest"; it involves the filed rate doctrine, a

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[6] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[7] *Younger v. Harris*, 401 U.S. 37 (1971).

matter over which the Council has neither control nor authority.

3. *Ripeness, Exhaustion of Remedies.*

Respondents' argument regarding ripeness and alleged failure to exhaust administrative remedies is also afflicted with this fallacious "blending" of the Council's rights with the Council's obligation. There is no requirement for PUBLIC SERVICE to go through the vain and useless act of seeking an administrative ruling on the filed rate doctrine. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, _____ U.S. _____, 106 S.Ct. 2718, 2722, n.1 (1986), this Court addressed respondents' ripeness and exhaustion of remedies argument:

> We think that any ripeness challenge to respondents' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S., at 458-460. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in respondent's favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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